Supreme Court of the United States.

OCTOBER TERM, 1940.

JOHN J. CHICKERING, ADMINISTRATOR,
Petitioner for Certiorari,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I. The decision cannot be reconciled with Helvering v. Helmholz.

The decision of the Circuit Court of Appeals was based wholly upon the proposition that the narrow special power which the decedent held was "a power . . . to alter" within the language of the Act. The power in question may best be described as a power of "disappointment." The limitations of the trust were that upon the death of the decedent the share of the corpus in which she had been beneficially interested should pass to her son, *unless* she should by deed direct that he should not receive it, in which event it was to go over to the other beneficiaries. This was the only power. Under it she might cut down or wholly cut off what her son should otherwise receive, but that was all. She could not direct how it should pass or apportion

it in any fashion among other beneficiaries. That was already taken care of by the trust indenture. It was, obviously, a special power.

The decedent in *Helvering* v. *Helmholz,* 296 U.S. 93, likewise had a special power which must as matter of law have had quite as great efficacy in subjecting the trust property to tax as Mrs. Chickering's power. But this Court there held that there could be no tax.

To discover the limitations of the Helmholz trust it is necessary to refer to the opinion of the Board of Tax Appeals (28 B.T.A. 165). It there appears that the trust provided:

> "Upon the death of any subscriber, to pay to such then living appointee or appointees as such deceased subscriber in and by last will and testament admitted to probate shall designate and appoint, the net dividends received in respect of the shares of stock by such subscriber transferred and assigned as aforesaid or such portion or portions thereof as such appointment shall direct. No appointment hereunder shall be effective for a longer period than the natural life of the appointee."

The decedent was a "subscriber." It was further provided that the subscriber's share should pass to her issue upon her death in default of appointment, or upon the termination of the life estate in the appointee in the event of appointment. In default of issue at either date the remainder went to the surviving subscribers and their issue. Thus Mrs. Helmholz had a special power to postpone her issue's taking through the interposition of a life estate.

Obviously if a power to cut off A so that the corpus may go to B (but not to C, D, or anyone else chosen

by the donee) constitutes a power to "alter, amend, or revoke," a power to postpone the vesting in possession of the corpus in A until the dropping of a life estate which may well last beyond A's own life must likewise constitute a power to "alter, amend, or revoke." Both beyond doubt are powers to vary the limitations of the settlement. But the decision of this Court in *Helvering* v. *Helmholz* establishes that the latter power does not suffice to subject the corpus to the estate tax. It must follow that the former power, which is the one with which we are here concerned, is likewise insufficient for that purpose.

It is true that the opinion of this Court in the *Helmholz* case does not discuss that power at all. But the point was nevertheless squarely presented and if the special power there held by the decedent had constituted a power to "alter, amend, or revoke" within the meaning of Section 302 (d) there could have been no occasion for the discussion of the power of termination which constituted the chief item of controversy. The case, therefore, is flat authority for the proposition that a power to interpose a life estate and so to postpone the vesting of a remainder does not constitute a power to "alter, amend, or revoke" under Section 302 (d). The remaindermen must have been living at the termination of the life estate created through exercise of the power in order to take. The exercise consequently might well result in the failure of one or more of the persons who would have taken at the death of the donee ever to take, for they might die before the life tenant. Death of the donee without appointment, therefore, would be quite as great assurance to them that they would take as it would be assurance to Mrs. Chickering's son in the instant case.

The Circuit Court of Appeals gave no extended discussion to its conclusion that the special power constituted the sort of power referred to in Section 302 (d). It said:

> "While the power retained by the decedent is phrased in terms of disinheritance, we can see no difference between this and a more conventionally phrased special power of appointment. As a practical matter Mrs. Chickering could choose between two possible objects—her son or the William A. Russell Trust—and could apportion the income and principal between them in any proportion she chose to the extent of complete exclusion of either. In cases involving equally narrow special powers, courts have frequently held that the enjoyment of the property in question was subject to a power in the transferor to 'alter, amend, or revoke' within the purview of §302 (d). *Commissioner* v. *Chase National Bank,* 82 F. (2d) 157, cert. denied, 299 U.S. 552; *Hoblitzelle* v. *United States,* 3 F. Supp. 331; *Holderness* v. *Commissioner,* 86 F. (2d) 137."

The three cases cited do not support this conclusion. In the *Hoblitzelle* case the power was very broad. It read:

> "'Section 11. The donor hereby reserves the right to change, alter, or amend the terms of this indenture at any time during her life, upon her written notice to the said trustees, and any and all such amendments shall be in writing, duly executed by the donor, and filed with the trustees: Provided, however, The donor shall not have the right to revoke and vacate this trust by any such amendment or alteration thereof.'" (3 F. Supp. 332.)

Obviously that was not an "equally narrow" special power. In the *Holderness* case the grantor had reserved three powers, one to withdraw $400,000, one to dispose of 25% of the corpus by will (a general power), and one to vary the beneficial interests of all beneficiaries. Patently the domination retained over that trust was very considerable. The narrow power in the case at bar is in no wise comparable. Finally, in the *Chase National Bank* case the court was careful to distinguish the *Helmholz* case. It said (82 F. (2d) at 158):

> "The distinction between this case and *Helvering* v. *Helmholz,* 296 U.S. 93, 56 S.Ct. 68, 80 L.Ed.—, and *White* v. *Poor,* 296 U.S. 98, 56 S. Ct. 66, 80 L. Ed.—, lies in the fact that in neither of them was there any power to alter, amend, or revoke within the meaning of section 302 (d)."

Thus it recognized that the power to postpone through the interposition of a life estate was not a power to "alter, amend, or revoke."

We submit that no sound distinction can be drawn between the power in the present case and that in the *Helmholz* case and consequently that the Circuit Court of Appeals has refused to follow the binding decision of this Court.

II. The Circuit Court of Appeals failed to apply the correct criteria with reference to the retroactive feature of the tax.

The focus of the opinion with reference to retroactivity appears at pages 101 and 102 of the record, where the court said:

> "It cannot be said that the tax here imposed is retroactive in any objectionable sense. While the

> trust was created in 1901, long before Congress had enacted an estate tax, the tax is an excise upon an event occurring subsequent to the enactment of the tax law. A similar argument about retroactivity was unsuccessfully made in *United States* v. *Jacobs*, 306 U. S. 363."

This represents a complete misconception of what Section 302 (d) is designed to do, and also a complete misunderstanding of the point we present.

The "event occurring subsequent to the enactment" is, of course, the death. But death alone does not subject all property formerly owned by the decedent to tax. For example, it never has been suggested that a trust settlement not made in contemplation of death and in which no power was reserved would be taxable. The tax accrues upon death, it is true, but it operates only upon the specific property designated by the several paragraphs of Section 302. Those several paragraphs proceed upon several different theories of jurisdiction to tax. The estate tax as a whole is a combination of several distinct kinds of taxes—death duties, transfer taxes, succession taxes, etc. Thus paragraphs (a) and (b) of Section 302 impose an excise upon death measured by the outright ownership of property. (Paragraph (b) is merely complementary to (a) to avoid subtraction of inchoate rights.) That is a death duty. Paragraph (c), the contemplation of death clause, clearly is a transfer tax. In order to prevent evasion of the death duty Congress taxes the transfer *inter vivos*. Although the tax accrues upon the death it is laid upon the transfer which preceded the death. Paragraph (e) is a death duty. It is in no way concerned with how the joint tenancy was created. No element of

transfer enters into the matter. The tax is laid upon death and is measured by the whole estate. Paragraph (f), the power of appointment clause, is a succession tax beyond question. See *Helvering* v. *Grinnell,* 294 U.S. 153. Paragraph (g), the insurance clause, is a death duty. In such a situation it is obvious that the criteria justifying the tax upon any particular piece of property will vary according to the nature of the tax.

Turning to paragraph (d) it is apparent that it, like paragraph (c), is a transfer tax. The first clause ("To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, . . . "), which defines the property which is to be taxed, is identical in both paragraphs. Unless there is a transfer before death neither paragraph can have any application. Only property so transferred is taxed under (d) and the tax clearly is a transfer tax. The theory on which the particular type of transfer in question is taxed is that it is an incomplete transfer, that the transferor through the device of a power has retained substantial dominion although he has parted with title. Unless such incomplete transfers are reached by the Act the tax could be evaded to a considerable extent.

But since the tax is a transfer tax it cannot apply where its effect would be retroactive. Unless the transfer is really incomplete (as in the case of a power to revoke) or unless after the passage of the Act the donee-transferor can destroy the power and make the transfer complete, the property is protected from tax by the Fifth Amendment.

Helvering v. *Helmholz,* 296 U.S. 93.
White v. *Poor,* 296 U.S. 98.

In the case at bar the transfer was not incomplete and the power was not destructible by the decedent in and after 1926.

The *Helmholz* case, for the reasons already pointed out, is conclusive that the existence of the power did not render the transfer incomplete. Moreover, apart from authority the same conclusion is apparent. This was not a simple power retained by a single grantor over property formerly owned by the grantor. The power was created by the joint act of six persons (the widow and five children of William A. Russell) and identical reciprocal powers in each of the other children were likewise created. Each grantor (if it be conceded for present purposes that the children could properly be termed grantors) became at the one time donee of the limited power and beneficially interested in the possible exercise of the other powers by the other donees. In effect, each said to each: "If you do nothing I am content that upon your death your share shall go to your issue, but I give you the power to cut off your issue. I do this in consideration of your giving me a similar power, and if you exercise the power I am to benefit by the exercise." That is not keeping such a string to property transferred as is contemplated by Section 302 (d). The transferor at whom Section 302 (d) is aimed is the person who retains substantial dominion. The reciprocal powers here involved certainly gave the donees no such thing.

If a donee exercises the power, whatever the others get from that donee's share must come to them not as *appointees* but as *owners* of the rights which they had created for themselves by the mutual covenants of 1901.

Yet the Circuit Court of Appeals has treated the case as though it involved simply a power reserved by a set-

tlor to appoint among two groups, (a) her own issue, (b) her brothers and sisters or their issue.

The Circuit Court of Appeals wholly failed to recognize that it was dealing with a transfer tax. This is apparent from the discussion of *United States* v. *Jacobs*, 306 U.S. 363. That case arose under Section 302 (e) which, as already shown, is in no way concerned with transfers. As this Court pointed out, that tax was in no sense retroactive and the taxpayer had wholly misconceived the basis of Section 302 (e) in his argument that it was retroactive. Here the tax is unquestionably laid upon a 1901 transfer and so equally unquestionably is retroactive.

Where a power is retained after the passage of the act, when it might be dropped, the retroactive feature of the tax is not within the denunciation of the Fifth Amendment. The cases in the Second Circuit establish this.

> *Porter* v. *Commissioner*, 60 F. (2d) 673.
> *Witherbee* v. *Commissioner*, 70 F. (2d) 696.
> *Commissioner* v. *Chase National Bank*, 82 F. (2d) 157.

All the Circuit Court of Appeals saw fit to say about this rule, hitherto unquestioned, was:

> "But the Supreme Court in affirming the Second Circuit in the *Porter* case made no mention of the releasability of the power as a vital factor in sustaining the tax. We doubt very much whether this makes any difference; it involves the questionable assumption that a person has a constitutional right to be afforded an alternative whereby a tax, otherwise unassailable, may be escaped."

But this Court in the *Jacobs* case recognized the rule which the court below characterized as a "questionable assumption." This Court said:

> "Until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains." (306 U.S. at 371.)

The whole theory of objectionable retroactive taxation is that it is unfair to tax a man for something which has been irrevocably done in the past. If he can undo that which has been done the unfairness disappears; but otherwise he has a constitutional right not to be taxed by reason of a situation which he cannot alter without agreement of adverse interests.

The conclusion of the court below that the power could have been freely released is manifestly erroneous. The opinion completely ignores the intricate interrelation between the reciprocal identical powers under the trust deed. The obvious intention was that all five children should be upon an equality. Each took the same immediate beneficial interest. Each received an identical power. Each had an identical, potential beneficial interest in the exercise of a power by each other. The balance was nicely calculated. That balance would have been destroyed by a release of the power by one. The release would have taken away the beneficial interest of each other grantor and could not, therefore, be accomplished without the consent of each. All joined in creating each power. All must likewise have joined in destroying any power. The attempted distinction of *In re Donne's Trusts*, L.R. 1 Ir. 516, is unsuccessful. Mrs. Chickering did not create the power. She joined in its

creation, but it stemmed quite as fully from her co-grantors as from her.

The interest of each as owner of the right to receive property cut off from the petitioner was adverse to Mrs. Chickering's renunciation of the right to cut him off. She had no right to withdraw her power from the scheme of the trust.

Conclusion.

We urge the Court to grant the writ in order to achieve uniformity on an important point—important both to the Treasury and to taxpayers. The opinion below fails to acknowledge the authority of this Court's decision and brushes aside a rule laid down in several cases by the Second Circuit. What transfers are taxable under Section 302 (d) was a troublesome question before the opinion of the court below was written. It now is far more troublesome and the doubts raised by that opinion should be dispelled by this Court.

Respectfully submitted,

FREDERICK H. NASH,
RICHARD WAIT.